

ASEAN Human Rights Declaration: A New Form of Universalism*

Rachminawati**

Abstract

Just recently ASEAN has adopted The ASEAN Human Rights Declaration. This declaration is a corner stone for ASEAN to establish human rights law instruments and mechanism in the future in order to support the upcoming ASEAN Community in 2015. However there are a lot of critiques upon the Declaration mostly come from human rights activist and NGOs. It is criticized that the declaration's principles and articles could erode universality of human rights as stated in the Universal Declaration of Human Rights. Highly criticized is to article 7 of the Declaration which mention that the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds. It argues that this article will use as a tool for state to limit the people rights. Contrary to mainstream critiques, the paper argues that the declaration did not contain any principles that erode the universality of human rights and fundamental freedom. Article 7 of the declaration is a limitation of rights pursuant to the international human rights law called Margin of Appreciation. The margin of appreciation doctrine allows the court to take into effect the fact that the Convention will be interpreted differently in different member states. Judges are obliged to take into account the cultural, historic and philosophical differences between Strasbourg and the nation in question.

Keywords: ASEAN Human Rights Declaration, Margin of Appreciation

I. INTRODUCTION

Human rights are the rights of all human beings¹ simply because it is based on the dignity of human nature endowed by reason and conscience inherent in human beings.² Life change to date of local realities towards national and even international, it appears that human rights have evolved in parallel in a complementary relationship.³

* This article was submitted to the 2013 IJIL Scientific Writing Competition, and has been awarded as the 1st Winner.

** Rachminawati, lecturer and researcher at International Law Department, Faculty of Law, Universitas Padjadjaran, Bandung, Indonesia. MA (the University of Portsmouth United Kingdom).

¹ Smith et al. (eds), *Hukum Hak Asasi Manusia*, (Yogyakarta: Pusat Studi Hak Asasi Manusia Islam Indonesia, 2008) at 7.

² Universal Declaration of Human Rights 1948.

³ Suryono, 'Implementasi Dan Sinkronisasi Hak Asasi Manusia Internasional Dan Nasional', in Muladi, *Hak Asasi Manusia Hakekat, Konsep Dan Implikasinya Dalam Perspektif Hukum Dan Masyarakat*, (Bandung: Refika Aditama, 2009) at 86.

Human rights are believed to have a universal value with no boundaries of space and time.⁴ Presently, contemporary doctrine of human rights is seen through the concept of universalism with the belief in the existence of universal moral code inherent in all humanity.⁵

Recognizing human rights as universal principles and values that cannot be divided and cannot be revoked or derogated were then transformed into national laws to protect and implement those universal values in different ways and approaches.⁶

Promotion and protection of human rights for all people around the world is an intricate matter considering the diversity of the nations that contribute to differences in conceptual formulation of human rights.⁷

This fact shows the paradox in that the values of human rights are universal in principles yet peculiar in their application. The various applications are related to the characteristics and specific nature in each country, and it is a fact that the countries in the world have nothing in common.⁸

The existence of the UDHR recognized as a high commitment of nations that human rights conceptualization should certainly be seen as a long history of human rights ever since the declaration of the Magna Charta 1215, followed by the petition of rights 1628 in the UK, the U.S. Declaration of Independence in 1776, and the Declaration of the Rights of Man and Citizen 1789 by France. The history of human rights shows that there is a very sharp philosophical difference both in terms of value and orientation, *inter alia*, the insistence on limiting the king in the United Kingdom; the priority to individual freedom in the United States; prioritizing egalitarianism and equality before the law in France; and the permissibility of non-recognition of individual rights but social and collective rights in Russia.⁹

⁴ Juwana, 'Pemberdayaan Budaya Hukum Dalam Perlindungan Hak Asasi Manusia di Indonesia; Hak Asasi Manusia Dalam Perspektif Sistem Hukum Internasional', in *Hak Asasi Manusia : Hakikat, Konsep, Dan Implikasinya Dalam Perspektif Hukum Dan Masyarakat*, (Bandung: Refika Aditama, 2009) at 70

⁵ Smith et al. (eds), *supra* n 2 at 17.

⁶ Juwana, *supra* n 5.

⁷ Mauna, *Hukum Internasional, Pengertian Peranan Dan Fungsi Dalam Era Dinamika Global*, (Bandung: Alumni, 2011) at 692.

⁸ Juwana, *supra* n 5.

⁹ El Muhtaj, *Dimensi-Dimensi HAM – Mengurai Hak Ekonomi, Sosial, dan Budaya*,

Complexity of countries and diverse perspectives of nation states on human rights issues affect the procedure of implementation;¹⁰ furthermore, human rights conception is influenced by the attitude and thinking, hence the concept of particularity of human rights existed. Despite the support, the controversies remain.

In one hand, the establishment of the ASEAN Declaration of Human Rights (hereinafter ADHR) shows the improved recognition of human rights in ASEAN countries, yet in another hand, it comes highly with critiques mentioned above. It leads us to the question: can the statements in the ADHR be called as a particularity of human rights and therefore abrogating the universality of it?

The question above shows what this article would expound—that there is a fight between universality and particularity of human rights. Is it really an appropriate condition to debate about them? How do we define the fight with that concept? What is universality of human rights and what is particularity of human rights? Is there any other concept to bring the harmony and peace to the conflicting both? The answers of those questions will depend on whether the AHRD contains Asian Values—particularity which opposes the universality of human rights.

In this essay, I attempt to defend the view that what is stated in the declaration as well as any other article claiming ASEAN values is not against the universality of human rights, nor is it a form of particularity thus not in compliance with the international human rights standards. It is my opinion that it is a kind of attempt to negotiate the universality and particularity of human rights, a new form of universality just like margin of appreciation in the European regime.

To that end, this paper has been divided into three parts. The first part deals with the myth and reality of universalism of human rights whereas the second part will come to learning outcome, that is, an analysis on AHRD as a new form of universalism, and the last part is conclusion.

(Jakarta: Rajawali Pers, 2008) at 8-10.

¹⁰ El Muhtaj, *supra* n 10 at 89.

II. UNIVERSALISM OF HUMAN RIGHTS: MYTH AND REALITY

Universal means applying the same to everyone everywhere; there is no room for the exception or derogation based on nations, race, culture, religion and gender. What can we identify as universal in the aforementioned sense? Is it applicable in the sense of human rights? What kind of human rights in that sense? Is it civil and political rights? What specifically of those civil and political rights that is universal? It is a never-ending question-and-answer as long as human exists.

It is argued that the absolute universal value of human rights is something that does not exist—it is a myth; nevertheless, it is true that relatively universal value of human rights is a reality,¹¹ as it is attached to human created by God for a purpose that God has planned. It can be concluded that the universal principle of human rights is absolute, but the implementation of human rights is relative.

According to those introductory questions above, this part will critically discuss the work of Prosser with his work titled “Universal Human Rights as Universal Values”. Despite the fact that many scholars have discussed the issue from many points of view, I will only focus on his perspective since he is the strongest advocator to the universalism [absolute] of human rights. Indeed, I will also include other scholars to add the value of the discussion. To limit the discussion, I will mainly focus on UDHR.

At the beginning of his paper, Prosser quoted from Thomas Jefferson, Jean Jacques Rousseau and from the text of French Revolution that life, liberty, happiness, private property, the Rights of Man and of The Citizen, equality, freedom, fraternity, popular sovereignty, religious tolerance and the separation of powers were perceived then as universal. From the beginning, he stood for the universality of human rights where he gave the definition of universal rights as those rights which are inherent in our very nature and without which we cannot live as full and free human beings.¹²

¹¹ The writer lend the term relatively universal from Donnaly

¹² Prosser, (forthcoming) ‘Universal Human Rights as Universal Values’, in Kulch and Prosser (eds)(forthcoming), *Values at the Theoretical Crossroads of Culture. Intercultural Research, Vol 4.*(Shanghai: Shanghai Foreign Language Education Press) at 3.

There's nothing actually misleading with the definition given by Prosser that is similar with the definition given by Donnelly that human rights are indeed "universal" rights in the sense that they are held "universally" by all human beings. Conceptual universality is in effect just another way of saying that human rights are, by definition, equal and inalienable.¹³

I personally agree that the rights to life, liberty, happiness, freedom, religious tolerance and other rights are universal and should be applied without any exception; however, its enforceability in practice will be very dependent on social, cultural, and political economy of a country.

There are inconsistencies in the beginning of the discussion; Prosser stated that, "...the broad spectrum of universal human rights, often more accepted in principle than in concrete cultural and national actions, especially with the contrasting views of Universalism and particularism." It is an expression of skepticism towards the implementation of universal values, which according to him, should be universally accepted.

There is an interesting issue before further discussion on the views of the UDHR. It is a Prosser's view on the United Nations with the United Nations Charter as the constituent instrument. Prosser noted that, "Among the universal values/rights enshrined in the UN Charter they include *dignity and worth of the human person, equal rights of men and women, justice, respect for obligations arising from treaties and international law, social progress, tolerance, peace, freedom and economic and social advancement of all peoples* which are all explicitly identified as universal human rights and values. Although ancient Western views of justice were articulated quite early, *human rights* and *social justice* were considered fundamental in establishing *dignity* and *equal rights* of all humans in the UN Charter"

I would support his argument that the charter indeed enshrined universal rights but what should be highlighted is that the charter did not ask for the diversity in the implementation of the rights enshrined in the treaties and international law. Moreover, it was an agreement to achieve common goal which was international peace and security. The dignity

¹³ Donnelly, *The Relative Universality of Human Rights (Revised)* (working paper no. 33, University of Denver, 2006) at 2.

of human person, tolerance and freedom are fundamental principles to achieve the peace and security in the world. How and in what way each nation state implements the respect for human dignity and freedom and building tolerance are rooms for state to rule and govern pursuant to the needs and culture of society. Therefore there will be no single concept for respecting human rights in that sense, it will indeed transform following the society.

If we compare to how we conclude international customary as a source of international law, there are at least contains two elements to be recognized as law. First is material factor, and second is psychological factor. Material factor is the actual practice indulged in by states constitutes the initial factor. There are numbers of point to be considered concerning its nature including the duration, consistency, repetition and generality of a particular practice by states. Second factor is *opinio juris sive necessitatis*. This is the psychological factor, a belief by state that behaved in a certain way that it was under a legal obligation to act that way.

What we can learn from the process above is human rights as stated in the UN Charter need a process to be universally recognized both in theory and implementation. It cannot be forced to be applied in all states to all people at the same time. Moreover, as *opinio juris sive necessitatis*, human rights need to be proved in more legal and formal way.

Moving forward to UDHR, Donnaly concluded that basically the UDHR consists of five types of international human rights. Accordingly, UDHR is a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms.

UDHR did not rule the specific rights commonly debated rights such as the freedom of religion, gay and lesbian rights.¹⁴ UDHR only shows the general and basic rights and principle. The efficacy of the rights and principle lies in member nations states pursuant to their socio, economic and cultural background. I put away the political condition of the

¹⁴ Sen, *Human Rights and Asean Values* (170 East 64th Street, New York NY: Carnegie Council on Ethics and International Affairs, 1997).

state because politics often used human rights as their tool to achieve their own goals and interest. It is a matter of how the court plays a role to assess whether there is political interest or not when a nation limits their citizen rights.

The debate over universalism and particularism has actually been done since the signing of the Vienna Convention of 1993, which put regional minimum standards. The validity of the universalism of human rights as well as the need to take into account the specific national conditions derived from the diversity of cultural, religious, social and economic in principle has been recognized by all states.¹⁵ The Foreign Minister of Singapore at the 1993 World Conference on Human Rights in Vienna warned that, “ Universal recognition of the ideal of human rights can be harmful if Universalist is used to deny or mask the reality of diversity”.¹⁶ It is actually to be understood correctly by those who still think on an absolute universalism.

Nonetheless, human rights in the modern sense may have an analogous function to the one of liberalism in his time as providing a set of procedures and institutions for expressing and mediating between ultimate and sometimes incompatible values. Human rights may be the sort of middle ground necessary for preserving the plurality of values that he observed.¹⁷ The UN brings human rights in their heart to make peace and security but peace will not come instantly, it needs a process. Let them glimpse the higher life that belongs to all humanity.¹⁸

¹⁵ Nowak, *Pengantar pada Rezim HAM Internasional* (Raoul Wallenberg Intitute, Martinus Nijhoff Publisher) at 63.

¹⁶ Sen, *supra* n 15 at 21.

¹⁷ Stokke, ‘Modernization without Westernization? Asian Values and Human Rights Discourse in East and West’, in Jacobsen And Bruun (eds), *Human Rights And Asian Values Contesting National Identities and Cultural Representations* in Asia, (Loncon: Curzon Press, 2000) at 155.

¹⁸ Ryn, *A Common Human Ground: Universality and Particularity in a Multicultural World* (Colombia and London, University of Missouri Press, 2003). at 133.

III. AHRD AS A NEW FORM OF UNIVERSALISM TOWARDS THE EFFECTIVE HUMAN RIGHTS IMPLEMENTATION IN ASEAN

Asian region is a continent that fall within the third world in the tracheotomy of human rights concepts. It is a group of developing countries which have diverse philosophy of life, ideologies, and historical background. Therefore it has its own concept of human rights [asian values - the concept particularism of human rights, which is different from the concept of universalism of human rights].¹⁹

Particularism value in the context of Asia can be seen in the propagation of the values of Asia (Asian Values) which is understood as a social morality that made resistance to the universal values which was considered as the hegemony of western culture²⁰. It is also strengthening the position in international politics over human rights in Asia.²¹ The tension between the views of Universalism and particularism as the source and commitment affect the development of modernity for human rights in the global political discourse.²²

Enthusiastic ASEAN governments are reflected in the participation of all ASEAN member states in the World Conference on Human Rights in Vienna in 1993 authorizing the Vienna Declaration and Programme of Action on Human Rights. At the same time the ten ASEAN member states have acceded the UDHR.²³

The advancement of human rights further appears from the implementation of the ASEAN Charter following by the establishment of the ASEAN human rights commission (ASEAN Inter-governmental Com-

¹⁹ Effendi, *Hak Asasi Manusia, Dalam Hukum Nasional Dan Internasional* (Malang: Ghalia Indonesia, 1993) at 23.

²⁰ Hardiman, *Hak-Hak Asasi Manusia : Polemik Dengan Agama Dan Kebudayaan* (Yogyakarta: Kanisius, 2011) at 92.

²¹ Jacobsen And Bruun (eds), *Human Rights And Asian Values Contesting National Identities and Cultural Representations in Asia*, (London: Curzon Press, 2000). at 1.

²² Walker, 'Universalism And Particularism in Human Rights : Trade-Off or Productive Tension' (2012) Research Paper Series No. 10, Endinburgh University at 1.

²³ Mustikawati, 'Perjalanan Penegakan Hak Asasi Manusia Di ASEAN Dan Peran Indonesia Dalam Mendukung Keberlanjutan AICHR' (2011) *Jurnal Demokrasi Dan Hak Asasi Manusia* (Jakarta: The Habibie Centre) at 13.

mission on Human Rights / hereinafter AICHR), which was formed in 2009 as mandated by the ASEAN Charter,²⁴ and the peak is the recognition of human rights in ADHR on 18 November 2012.

ADHR is appreciated by many groups because it is considered as a main gate for the protection of human rights in the Southeast Asian region. ADHR is a cornerstone for “ASEAN citizen” to have more binding regional instruments in human rights.²⁵ However, in addition of appreciation, a lot of criticism remains from both the content and process of the declarations.

Civil society groups in ASEAN have expressed disappointment over the content and process of the first-ever ASEAN human rights declaration, which aims to ensure human rights protection for 600 million people in the region. Yuyun Wahyuningrum, senior advisor on ASEAN and Human Rights at the Human Rights Working Groups (HRWG), which represents more than 50 human rights groups in Indonesia, said that the draft did not reflect the universal values that ASEAN pledged to uphold. She said that the three detrimental articles undermined the ADHR, making it a watered-down version of universal values. A number of articles in the draft suggested the declaration had become too much about negotiating the national interests of various ASEAN states rather than about improving human rights.²⁶

Strongly supported by Harpe from Amnesty International, stated that ADHR not meet international standards of human rights. According to human rights cannot be limited by safety, morals and public order.²⁷

That critic basically assumes that ADHR reflects Asian values as a form of particularism that is considered undermining universal human

²⁴ Mustikawati, *supra* n 24 at 20.

²⁵ Rachminawati and Syngellakis, ‘Law and Policy: A useful Model for ASEAN?’, In Novotny and Portela (eds), *EU-ASEAN Relations in the 21st Century*, (United Kingdom: Palgrave Macmillan, 2012) at 116.

²⁶ Ririhena, ‘First Asean Human Rights Declaration Criticized’, The Jakarta Post, Jakarta | World | Mon, October 29 2012, 9:37 AM, available at: <http://www.thejakarta-post.com/news/2012/10/29/first-asean-human-rights-declaration-criticized.html>

²⁷ Amnesty Internasional. ‘Deklarasi Hak Asasi Manusia ASEAN Kontroversial’, available at <<http://www.dw.de/harpe-deklarasi-ham-asean-kontroversial/a-16399347>> [03/05/2013].

rights protection.²⁸ Is it true? Which article is considered contrary to the universal values of human rights?

I will not answer whether it is true or not, nor will I defend universalism which is much promoted by NGOs and would not also support the particularist – to which, according to human rights NGOs is some ASEAN country's leader or government. The author will identify the content of the declaration and consider it a form of particularism, which will then be analyzed by the authors by comparing it to the application of the margin of appreciation in the European region under the Council of Europe.

Some scholars argue that it is inappropriate comparing Asian values to the margin of appreciation because of the historical background of human rights as well as its restriction in the European context is different from the Asian context.²⁹ If the Margin of Appreciation is a doctrine associated with the implementation of restrictions on human rights in the ECHR where Member states enjoy a certain margin of appreciation in asserting whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin will vary according to circumstances, subject matter and its background.³⁰

Asian values doctrine denied the concept of universal human rights because the existence of local or cultural values are very diverse. It is affected by the religious values or beliefs of Asia such as Confucianism, Hinduism, and fundamental Islamism.

The wording of both Asian values and margin of appreciation is indeed different, but if we look at the history of how the margin of appreciation developed, then the similarity will reveal. The fact that the member states of Council of Europe do not have common values with regard to human rights in all aspects,³¹ raising the problems of imple-

28 Hukum Online, 'HRWG Kritik Substansi Deklarasi Hak Asasi Manusia ASEAN', available at <<http://www.hukumonline.com/berita/baca/lt5063269e00520/hrwg-kritik-substansi-deklarasi-ham-asean>> [26/09/2012].

29 Davies, *An ASEAN Magna Carta*, <http://www.hrwg.org/en/asean/civil-society-activities/asean-human-rights-declaration>, [04/04/ 2013].

30 *Handyside v UK*, 1984.

31 Rachminawati and Syngellakis, *supra* N 26, at 70.

mentation of the convention norms. Therefore Margin of Appreciation was designed to provide flexibility in resolving emerging conflicts from diverse social, political, cultural and legal traditions of the contracting states within the European context.³²

If Asian values attributed greatly influenced by religious values and beliefs which were assessed by universalist containing some practice of human rights violations such as the issue of caste which violated the equal and non discrimination principles. What about the human rights value in Europe? Does it not closely related to religious values or beliefs? As already explained earlier that the concept of human rights in Europe is derived from the French Revolution, Christian Universalism and natural-law philosophy. The idea of universal human rights, therefore, had a definite, particular and historically contingent political and philosophical base. So, it closely related to the European religious value and belief, respectively Christian.³³

I believe that all religions and beliefs have a concept of its own human rights. if religious values and beliefs truly understood, executed and interpreted properly as to the present context, there will be no more clash between religion or belief and human rights.

Importantly noticed that the wording of human rights limitation in ADHR perceives as Asian values. What article and How the wording of it? article 7 of ADHR is one of harshly criticized. This article recognize the universalism and simultaneously recognized particularism.

“all human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical

³² Onder Bakircioglu, The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases, *German Law Journal*, vol 08 No. 07, http://www.germanlawjournal.org/pdfs/Vol08No07/PDF_Vol_08_No_07_711-734_Articles_Bakircioglu.pdf 711.

³³ Freeman, ‘Universal Rights and Particular Cultures’, in Jacobsen And Bruun (eds), *Human Rights Andasian Values Contesting National Identities and Cultural Representations in Asia*, (London, Curzon Press, 2000).

and religious backgrounds”³⁴

If we compare with the wording of limitation in the margin of appreciation and of certain article in ADHR, is different or similar? I must say the wording is similar. Further question is, similar in wording, Margin of Appreciation rarely considered as a European doctrine that reduces respect for human rights and is not in accordance with international human rights standards, then why the restrictions in ADHR say so?

Before elaborating more on the answer, would show that Asian values was already manifest in a positive norm in a declaration. It indicates that Asian values are changed (at least from 1967 - 1990). So, Asian values today is different from the past. It is a very positive change that is certainly not free from societal change towards acceptance human rights in ASEAN. Of these changes clearly irrelevant if always discredit asian values as the biggest barrier of human rights. Bearing in mind the discussion of West vs. East seems already to be terminated.

What should be done? We have to see the ADHR as a remarkable development towards universally recognized of UDHR. We could not then just see the restriction clause for example in article 7 of ADHR then claimed that a particularity is there and threaten the universal value.

Margin of Appreciation will allow to be applied where there is an absence of a uniform European conception of the implications of the convention.³⁵ ECtHR relies that national authorities are in a better position to obtain and assess local knowledge, which the court may either not have, or the significance of which it may misjudge.³⁶ It is very clear that The margin of appreciation doctrine is the concept by which the Convention derives its force, meaning and effect. The margin of appreciation doctrine seeks to strike a fair balance between the demands of the general interest of the community and public order on the one hand, and the requirements of the protection of the individual rights and freedoms on the other, within the context and framework of the Convention. In arriving at such a balance the scope of a state's right to limit

³⁴ Article 7, ASEAN Declaration on Human Rights 2012.

³⁵ De Schutter, *International Human Rights Law Cases, Materials, Commentary*, (UK: Cambridge University Press, 2010) at 447.

³⁶ Greer, *The European Convention On Human Rights Achievements, Problems and Prospects* (United Kingdom: Cambridge University Press, 2006) at 224.

and restrict the rights and freedoms of the individual will necessarily be determined.³⁷

ECtHR judges awareness that universal values which enshrined in the ECHR can be applied effectively if it be enforced coercively. As explained in the previous part that it is the Margin of Appreciation who makes the ECHR and the ECtHR remains the conventions and institutions that are respected by the member states of the Council of Europe. Bearing in mind that more than 60 years, UDHR is not fully recognized in Asia region including certain state in Southeast Asia. Truthfully, it was not because of rejection of universal values that was brought by the UDHR but because there are several international human rights norms that forced to be applied universally in all countries. When there is a force there is actually violation of human rights occurred. At the beginning, human rights are recognition of existence of, respect for and protection of the human being becoming something with politicization and interests of some groups of countries.

Paolo Carozza in *Fifty Years of the European Court of Human Rights* inauguration strongly stated that the history of regional systems in general (*vis-à-vis* the universal human rights institutions and processes), and the history of the European Court within its own area, demonstrate that a degree of diversity and pluralism, within the limits of the requirements of human dignity, is not only compatible with the idea of human rights but even important to their realization. As we contemplate the problem of fragmentation in international law, including human rights law, it may be important to remember that pluralism can in some circumstances also bring the benefits of dynamism, flexibility, healthy experimentation, and responsiveness of the law to society. Harmonization does not need to be homogenization. No less, may we hope for our regional systems and the democracies within them to be such laboratories for the realization of human rights.³⁸

European experience should be remembered and noticed in an ap-

³⁷ Tümay, 'The "Margin of Appreciation Doctrine" Developed By The Case Law Of The European Court Of Human Rights' (2008) *Ankara Law Review* Vol. 5 No. 2 at 231.

³⁸ Carozza, *Fifty Years of the European Court of Human Rights* viewed by Its Fellow International Courts, http://www.echr.coe.int/NR/rdonlyres/3B662702-FFDB-4187AAC56B926725DF35/0/30012009PresidentCarozzaSeminar_eng_.pdf

propriate way as a lesson for Asean to harmonyze the international human rights law in their region. I would emphasized more that he margin of appreciation is a universal value in principle but particular in practice, and therefore I called it as a new forms of universalism that is able to bridge the conflict between universal and particular value of human rights. Thus, as well as a “new” Asian values currently contained in ADHR, conclude that ADHR is a new form of Universalism of human rights in ASEAN.

Critics were filed against ADHR, for example article 7 as mentioned above, it is noting with all limitation in article 7 but, it is a critique of certain rights, a very sensitive one such as LGBTs rights. It is also a critic to the implementation of human rights in ASEAN.³⁹

Critics of LGBTs rights which seemed that ADHR did not accommodate their rights were ill founded. Ever in UDHR or ECHR never mentioned implicitly this particular minority group. As several cases in this regard in the ECtHR noted earlier, ECtHR provide different judgment in the case similar issue. This particular minority group rights indeed need to be protected, but how the state protect them will vary according to the justified limitation. Let the recognition of this group flow naturally.

A second criticism goes to the implementation of ADHR. It stated unclearly that this is a problem of the implementation of ADHR but the authors conclude that the fearnes that the restriction is used to justify human rights limitation lead to human rights violation. The assumption that those limitations adhere the interest of several parties.⁴⁰ It is understandable, but however it does not appropriate if ADHR is not in line with international standard of human rights, in fact the international human rights law recognized those limitation. Lesson learned from Europe is the existence of ECtHR as an observer and guardian of those limitations and of a whole convention.

As frequently stated in this paper, ECtHR relies that national authorities are in a better position to obtain and assess local knowledge, which the court may either not have, or the significance of which it may

³⁹ Villanueva, *ASEAN 'Magna Carta' universalizes human rights*, <http://www.hrwg.org/en/asean/civil-society-activities/asean-human-rights-declaration>

⁴⁰ *Ibid*

misjudge.⁴¹ However this margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it.⁴²

In response those thesis above, therefore Asean need to have an Asean Human Rights Court⁴³ whose jurisdiction is to assess whether member states apply the Asian values enshrined in the ADHR proportionately pursuant to international human rights law. Judges of Asean Court of Human Rights require having a broad knowledge concerning the condition of each member states economically, socially, politically and culturally. AICHR does not seem to be able to play this function and role respectively.

Colm Campbell and Avril McDonald suggested that the most important than always criticizing Asian values or comparing the East versus the West idea of human rights is supporting the efforts of ASEAN through upholding the ADHR, the “ASEAN Magna Charta”.

It believes that the adoption of a human rights charter for the Pacific region would seem to be a realizable goal, and the efforts of regional human rights and democracy organizations, and legal groups, to achieve it should be supported, politically, diplomatically, and financially. Assistance can also be extended in disseminating human rights information sub-regionally. A more robust role for states in the region with reasonably clean human rights records in promoting human rights and responding to violations should be encouraged. Existing mechanisms for monitoring human rights abuses during states of emergency need to be more forcefully employed. He Finally urged Western actors need to develop a greater understanding of, and empathy with, legitimate perspectives within Asia on appropriate formulations of universal human rights standards [as asia or other region understand Europe with its Margin of Appreciation].⁴⁴

⁴¹ Greer, supra n 37.

⁴² De Schutter, supra n 36 at 334.

⁴³ Rachminawati and Syngellakis, supra n 26 at 121.

⁴⁴ Campbell and McDonald, ‘Practice to Theory: States of Emergency and Human Rights Protection In Asia’, In Jacobsen and Bruun (eds), *Human Rights And Asian Values Contesting National Identities And Cultural Representations In Asia*, (London: Curzon Press, 2000) at 278.

IV. CONCLUSION

Human rights in the modern sense may have an analogous function to the one of liberalism in his time as providing a set of procedures and institutions for expressing and mediating between ultimate and sometimes incompatible values. Human rights may be the sort of middle ground necessary for preserving the plurality of values that he observed.

Margin of Appreciation, despites its weaknesses it promises the international implementation of international human rights law gradually. However it needs for the articulation of solid and foreseeable criteria of each limitation. It is crucial for the future existence of the human rights to be legally and universally recognized.

According to European experience, Asian Values today which enshrined in the ADHR will not erode the universality of human rights, it is a new form of universalism of human rights. To be home grown and well implemented, human rights indeed has to take into account the political, economic, legal, social, cultural, historical and religious backgrounds. Of course we are heading up to be universal but however we have to go incrementally step by step in understanding and peace. Accordingly, the most important things for ASEAN is the need to build the strong human rights mechanism through the establishment of ASEAN Court of Human Rights.

REFERENCES

Books

- De Schutter, *International Human Rights Law Cases, Materials, Commentary*, (UK: Cambridge University Press, 2010).
- Effendi, *Hak Asasi Manusia, Dalam Hukum Nasional Dan Internasional* (Malang: Ghalia Indonesia, 1993).
- El Muhtaj, *Dimensi-Dimensi HAM – Mengurai Hak Ekonomi, Sosial, an Budaya* (Rajawali Pers, 2008).
- Greer, *The European Convention On Human Rights Achievements, Problems and Prospects* (United Kingdom: Cambridge University Press, 2006).
- Hardiman, *Hak-Hak Asasi Manusia : Polemik Dengan Agama Dan Kebudayaan* (Yogyakarta: Kanisius, 2011).
- Jacobsen And Bruun (eds), *Human Rights And Asian Values Contesting National Identities and Cultural Representations in Asia*, (London: Curzon Press, 2000).
- Nowak, *Pengantar pada Rezim HAM Internasional*, (Raoul Wallenberg Intitute, Mar-

tinus Nijhoff Publisher).

Ryn, *A Common Human Ground: Universality and Particularity in a Multicultural World* (Colombia and London, University of Missouri Press, 2003).

Sen, *Human Rights and Asean Values* (New York: Carnegie Council on Ethics and International Affairs, 1997).

Smith et al. (eds), *Hukum Hak Asasi Manusia* (Yogyakarta: Pusat Studi Hak Asasi Manusia Islam Indonesia, 2008).

Essays within books

Campbell and McDonald, 'Practice to Theory: States of Emergency and Human Rights Protection In Asia', in Jacobsen And Bruun (eds), *Human Rights And Asian Values Contesting National Identities And Cultural Representations In Asia* (London: Curzon Press, 2000).

Freeman, 'Universal Rights and Particular Cultures', in Jacobsen And Bruun (eds), *Human Rights And Asian Values Contesting National Identities and Cultural Representations in Asia*, (London, Curzon Press, 2000).

Juwana, 'Pemberdayaan Budaya Hukum Dalam Perlindungan Hak Asasi Manusia di Indonesia; Hak Asasi Manusia Dalam Perspektif Sistem Hukum Internasional', in Muladi, *Hak Asasi Manusia : Hakikat, Konsep, Dan Implikasinya Dalam Perspektif Hukum Dan Masyarakat*, (Bandung: Refika Aditama, 2009).

Prosser, (forthcoming) 'Universal Human Rights as Universal Values', in Kulch and Prosser (eds) (forthcoming), *Values at the Theoretical Crossroads of Culture. Intercultural Research, Vol 4*. (Shanghai: Shanghai Foreign Language Education Press).

Rachminawati and Syngellakis, 'Law and Policy: A useful Model for ASEAN?', In Novotny and Portela (eds), *EU-ASEAN Relations in the 21st Century*, (United Kingdom: Palgrave Macmillan, 2012).

Stokke, 'Modernization without Westernization? Asian Values and Human Rights Discourse in East and West', in Jacobsen And Bruun (eds), *Human Rights And Asian Values Contesting National Identities and Cultural Representations in Asia* (london: Curzon Press, 2000).

Suryono, 'Implementasi Dan Sinkronisasi Hak Asasi Manusia Internasional Dan Nasional', in Muladi, *Hak Asasi Manusia Hakekat, Konsep Dan Implikasinya Dalam Perspektif Hukum Dan Masyarakat* (Bandung: Refika Aditama, 2009).

Articles

Mustikawati, 'Perjalanan Penegakan Hak Asasi Manusia Di ASEAN Dan Peran Indonesia Dalam Mendukung Keberlanjutan AICHR' (2011) *Jurnal Demokrasi Dan Hak Asasi Manusia* (Jakarta: The Habibie Centre).

Tümay, 'The "Margin of Appreciation Doctrine" Developed By The Case Law Of The European Court Of Human Rights' (2008) *Ankara Law Review* Vol. 5 No. 2.

Unpublished Theses

Donnaly, *The Relative Universality of Human Rights (Revised)*, (Working paper no. 33, University of Denver, 2006).

Walker, *Universalism And Particularism in Human Rights : Trade-Off or Productive Tension* (Research Paper Series No. 10, Endinburgh University, 2012).

Treaties

Declaration Universal on Human Rights 1948

Asean Human Rights Declaration 2012

Electronic Sources

Bakircioglu, The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases , *German Law journal*, vol 08 No. 07, http://www.germanlawjournal.org/pdfs/Vol08No07/PDF_Vol_08_No_07_711-734_Articles_Bakircioglu.pdf,

Carozza, *Fifty Years of the European Court of Human Rights* viewed by Its Fellow International Courts, http://www.echr.coe.int/NR/rdonlyres/3B662702-FFDB-4187AAC56B926725DF35/0/30012009PresidentCarozzaSeminar_eng_.pdf

Davies, *An ASEAN Magna Carta*, <http://www.hrwg.org/en/asean/civil-society-activities/asean-human-rights-declaration>, 4 april 2013

Hukum Online, *HRWG Kritik Substansi Deklarasi Hak Asasi Manusia ASEAN*. Melalui < <http://www.hukumonline.com/berita/baca/lt5063269e00520/hrwg-kritik-substansi-deklarasi-ham-asean>> [26/09/2012]

Ririhena, *First Asean Human Rights Declaration Criticized*, The Jakarta Post, Jakarta | World | Mon, October 29 2012, 9:37 AM, <http://www.thejakartapost.com/news/2012/10/29/first-asean-human-rights-declaration-criticized.html>

Villanueva, *ASEAN 'Magna Carta' universalizes human rights*, <http://www.hrwg.org/en/asean/civil-society-activities/asean-human-rights-declaration>